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No. 91-1122

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

IN RE: PATRICK F. MESSING, AND NORA B. MESSING,
Debtors,

ANN MOSTOLLER, TRUSTEE,
Petitioner,

vs.

PATRICK F. MESSING,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

GEORGE FREEMAN LEGG
Counsel of Record
BECKY HURD HALSEY
STONE & HINDS, P.C.
Attorneys for Respondent
700 First American Center
507 Gay Street, S.W.
Knoxville, Tennessee 37902
(615) 546-6321

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QUESTIONS PRESENTED FOR REVIEW

I. Is a bankruptcy debtor's interest in a pension plan qualified under the Employee Retirement Income Security Act (ERISA), excluded from the bankruptcy estate pursuant to 11 U.S.C. § 541(c)(2)?

II. Does the "plain meaning" rule apply when the "plain meaning" appears inconsistent with another section of the same statute and was not discussed in the legislative history?

LIST OF PARTIES

The petitioner in this action is Ann Mostoller, Trustee. The respondent in this action is Patrick F. Messing, Debtor.

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No. 91-1122

In The

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October Term, 1991

IN RE: PATRICK F. MESSING, AND NORA B. MESSING,

Debtors,

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Petitioner,

vs.

PATRICK F. MESSING,

Respondent.

On Petition for a Writ of Certioriari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Patrick F. Messing, respectfully submits this brief pursuant to Sup. Ct. R. 15, in opposition to the petition for a writ of certiorari filed by Ann Mostoller, Trustee, and asks

this Court for a summary disposition on the merits pursuant to Sup. Ct. R. 16.1.

OPINIONS BELOW

Mostoller, Trustee v. Messing, No. 91-5087 (6th Cir. Sept. 24, 1991). *See* Appendix A to petitioner's petition for a writ of certiorari.

Mostoller, Trustee v. Messing, No. Civ. 3-90-601 (E.D. Tenn. Dec. 13, 1990). *See* Appendix B to petitioner's petition for a writ of certiorari.

In re Patrick F. Messing and Nora B. Messing, Case No. 3-89-01961 (Bankr. May 14, 1990). *See* Appendix C to Petitioner's Petition for a Writ of Certiorari.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The order of the Sixth Circuit denying the petition for rehearing was filed October 10, 1991. The petitioner, Ann Mostoller, Trustee, filed an original petition for a writ of certiorari in this Court on January 8, 1992, and the original petition was served upon and received by respondent on January 10, 1992.

STATUTES INVOLVED

The pertinent text of the statutes cited here is reprinted at Appendix A at page 1a.

11 U.S.C. § 522(d)(10)(E);

11 U.S.C. § 541(c)(2);

29 U.S.C. § 1056(d)(1) (1988).

STATEMENT OF THE CASE

The respondent, Patrick F. Messing, respectfully opposes the petition of Ann Mostoller, Trustee, for a writ of certiorari ("petition") and asks this Court to enter an order pursuant to Sup. Ct. R. 16.1 summarily disposing of this matter on the merits.

The *Messing* opinion filed by the Sixth Circuit Court of Appeals on September 24, 1991, is a clear and decisive interpretation and application of 11 U.S.C. § 541(c)(2). Relying on *Forbes v. Lucas (In re Lucas)*, 924 F.2d 597 (6th Cir. 1991), *cert. denied*, 111 S. Ct. 2275 (1991), and the anti-assignment and anti-alienation provisions of ERISA at 29 U.S.C. § 1056(d)(1), the Sixth Circuit held that the debtor's ERISA pension plan benefits were excluded from his bankruptcy estate pursuant to § 541(c)(2), and hence were not subject to the reach of creditors in bankruptcy. *See* Appendix A to petition. The holding is consistent with the plain meaning of the statute, with determinations made in three (3) other circuits and with the policy of Congress and this Court to protect ERISA-qualified pension benefits from the reach of creditors. *See infra*. Contrary to petitioner's assertions, the plain meaning of § 541(c)(2) does not render 11 U.S.C. § 522(d)(10)(E) superfluous. The latter section relates to exemption of welfare plan distributions which the debtor has an immediate right to receive, while § 541(c)(2) excludes pension plan funds which the debtor cannot reach. It has been stipulated by the parties that the plan in issue herein is a pension plan containing the anti-assignment/anti-alienation provisions required by 29 U.S.C. § 1056(d)(1). Accordingly, this is a pension plan which must be excluded under § 541(c)(2).

Review of this matter pursuant to a writ of certiorari is unnecessary. This Court should adopt the decision in *Lucas*, as

applied in *Messing*, and summarily affirm the judgment under appeal.

REASONS FOR OPPOSING THE WRIT

I.

MISSTATEMENTS OF LAW BEARING ON THE DECISION TO GRANT CERTIORARI.

With regard to the petition filed herein on January 8, 1992, respondent would first like to make the Court aware of certain mischaracterizations of the status of the law on the issue presented, which misstatements may have some bearing on the Court's decision regarding certiorari.

Petitioner has presented for review the question of whether a bankruptcy debtor's interest in a pension plan qualified under ERISA is excluded from the bankruptcy estate pursuant to 11 U.S.C. § 541(c)(2). In the petition for a writ of certiorari, petitioner argues that the "majority" view is that only ERISA-qualified plans which constititue spendthrift trusts under state law are excluded from bankruptcy estate under § 541(c)(2). In fact, four circuits have held that all ERISA-qualified pension plans are excluded from the bankruptcy estate under § 541(c)(2). *Gladwell v. Harline*, No. 90-4157 (10th Cir. Dec. 5, 1991) (available at 1991 U.S. App. Lexis 28540); *Velis v. Kardanis*, No. 91-5084 (3rd Cir. Nov. 14, 1991) (available at 1991 U.S. App. Lexis 26809); *Forbes v. Lucas (In re Lucas)*, 924 F.2d 597 (6th Cir. 1991); *Anderson v. Raine (In re Moore)*, 907 F.2d 1476 (4th Cir. 1990). Thus, the circuits are split four to four rather than four to two as suggested by petitioner. Accordingly, each of petitioner's references to a majority and minority view is a mischaracterization of the status of the law which may have some bearing on the Court's decision to grant certiorari.

It should also be noted that petitioner places substantial emphasis, in her petition, on the district court opinion in *In re Velis*, 123 B.R. 497 (D.N.J. 1991). *See* petition at pp. 11, 13, 15, 16, and 22. The Third Circuit recently reversed the *Velis* decision, holding that undistributed assets in any ERISA-qualified pension or Keogh plan are excluded from the bankruptcy estate under § 541(c)(2). *See Kardanis, supra*. A petition for rehearing in *Kardanis* was denied on December 26, 1991. Accordingly, petitioner's references to the district court opinion in *Velis* should not be accorded significant weight by this Court in making its determination with regard to granting certiorari.

II.

THE SIXTH CIRCUIT DECISION SHOULD BE SUMMARILY AFFIRMED AS CONSISTENT WITH THE PLAIN MEANING OF THE STATUTE, CONGRESSIONAL POLICY AND THE HOLDINGS OF THIS COURT.

Respondent opposes the efforts of petitioner to subject him to prolonged litigation with regard to this pension plan, where the Sixth Circuit interpretation of § 541(c)(2) is consistent with the plain meaning of the statute *and* consistent with congressional policy to protect ERISA-qualified pension benefits from the reach of creditors. Respondent requests, therefore, that this Court enter an order pursuant to Sup. Ct. R. 16.1, summarily disposing of this matter on the merits.

The Sixth Circuit has twice espoused the rule with regard to exclusion of ERISA-qualified pension benefits under 11 U.S.C. § 541(c)(2). *See, supra, Messing* and *Lucas*. In each case, the Sixth Circuit correctly held that the plain meaning of § 541(c)(2) required exclusion of ERISA-qualified pension plans from a debtor's estate in bankruptcy. This Court denied certiorari in the *Lucas* case. Three (3) other circuits are in agreement with regard to the plain

meaning of the statute. *See, supra, Gladwell, Kardanis, and Moore.*

Petitioner's effort to restrict the exclusion under § 541(c)(2) to trusts qualifying as spendthrift trusts under state law is inconsistent with the clear language of the statute. Section 541(c)(2) provides that where transfer of the beneficial interest of the debtor in a trust is restricted under *applicable nonbankruptcy law*, such a restriction is enforceable in a bankruptcy proceeding.

Petitioner's suggestion that the term "applicable nonbankruptcy law" was intended to be restricted to *state* law also lacks support in the language of the other sections of the bankruptcy statute. Even a cursory review of the Bankruptcy Code reveals that "[w]hen Congress intended to refer to state law, it did so explicitly." *See Anderson v. Raine (In re Moore)*, 907 F.2d 1476, 1478 (4th Cir. 1990), (citing references to "state law" at 11 U.S.C. §§ 109(c)(2), 522(b)(1) and (2), 523(a)(5), 362(b)(12), 903(1) and 1145(a)). Clearly, if Congress had intended to restrict this exclusion to trusts qualifying as spendthrift trusts under *state* law, such an intention would have been expressed in the statute. Petitioner offers no explanation why Congress would omit the reference to state law, if such a restriction was intended in § 541(c)(2). Basic principles of statutory construction dictate that both federal and state law are encompassed within the term *applicable nonbankruptcy law.*

This interpretation is consistent with the meaning Congress intended when it utilized the term *applicable nonbankruptcy law* in other sections of the Bankruptcy Code. *See Gladwell v. Harline*, No. 90-4157 (10th Cir. Dec. 5, 1991) (available at 1991 U.S. App. Lexis 28540) (citing references to *applicable nonbankruptcy law* at 11 U.S.C. §§ 101(56) and 108(a), (b) and (c)). The reference to *applicable nonbankruptcy law* at 11 U.S.C. § 101(56) refers to federal laws concerning trade secrets, patents and plant varieties.

Moreover, courts have repeatedly held that the term *applicable nonbankruptcy law* as applied at 11 U.S.C. §§ 108(a), (b) and (c) refers to federal law. *See Gladwell.*

The term *applicable nonbankruptcy law* is presumed to have the same meaning in § 541(c)(2) as it does in all other subsections of the Bankruptcy Code in which it is used. *Morrison-Knudsen Construction Co. v. Director, OWCP*, 461 U.S. 624, 633 (1983) ("a word is presumed to have the same meaning in all subsections of the same statute"). This phrase has clearly been construed to encompass both federal and state law. Accordingly, any reading which would restrict the phrase to state law, is inconsistent with the other subsections of the statute.

"[W]here. . .the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms'." *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989). Petitioner's efforts to ascribe a more narrow meaning to the term by resort to the legislative history are inappropriate where the language of the statute is clear. *Burlington Northern R.R. v. Oklahoma Tax Comm'n.*, 481 U.S. 454, 461 (1987) (unless exceptional circumstances dictate otherwise, when the terms of a statute are unambiguous, judicial inquiry is complete); *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 808, n.3 (1989) ("Legislative history is irrelevant to the interpretation of an unambiguous statute."). Based on the clear meaning of the phrase and its use in other subsections, the term *applicable nonbankruptcy law* undoubtedly applies to state and federal laws.

The anti-alienation/anti-assignment provision at 29 U.S.C. § 1056(d)(1) requires that ERISA pension plans *shall* include provisions which restrict the transfer of pension benefits. *See also, Mackey v. Lanier Collections Agency and Service, Inc.*, 486 U.S. 825 (1988). This restriction on the transfer by the debtor of his interest in the pension plan is enforceable under *applicable*

nonbankruptcy law, i.e., ERISA. Thus, pursuant to 11 U.S.C. § 541(c)(2), it is also enforceable "in a case under this title". The clear meaning of the statute requires exclusion from the bankruptcy estate of an ERISA pension plan containing the requisite anti-assignment/anti-alienation provisions. Petitioner has stipulated to the fact that this is a pension plan which contains those provisions. *See* petition at page 5; Bankruptcy Court opinion at Appendix C to petition. Accordingly, exclusion of this plan is appropriate under § 541(c)(2).

Despite petitioner's stringent assertions to the contrary, this construction of § 541(c)(2) does not render 11 U.S.C. § 522(d)(10)(E) superfluous. One court has commented that section 522(d)(10)(E) is an exemption provision relating to "distributions which the debtor has a present and immediate right to receive." *See Kardanis, supra*. Respondent submits that the *Kardanis* Court was referring to distribution of funds under an ERISA welfare benefit plan which is ot subject to § 1056(d)(1) and under which a debtor may draw down funds for specified purposes. Thus, it is submitted that application of 11 U.S.C. § 522(d)(10)(E) to welfare benefit plans, is not nullified by exclusion of pension plans under § 541(c)(2).

This Court addressed the distinction between the two types of benefit plans in *Mackey v. Lanier Collections Agency & Service, Inc.*, 486 U.S. 825 (1988). The *Mackey* Court rejected the argument that ERISA *welfare* benefit plans were protected from state law enforcement mechanisms, *e.g.* garnishment, noting that when Congress intended to protect an ERISA benefit plan, it did so expressly. The Court specifically distinguished the ERISA welfare plan from the ERISA *pension* benefit plans which prohibits the alienation or assignment of pension benefits under 29 U.S.C. § 1056(d)(1). *See Mackey*, 486 U.S. at 836. The Court found that § 1056(d)(1) protected ERISA pension benefit plans from the use of state enforcement mechanisms by judgment creditors.

The discussion of welfare plans and pension plans in *Mackay* clarifies the distinction which the *Kardanis* court was trying to make, and leads to two distinct conclusions. First, a debtor's pension plan is subject to the anti-assignment/anti-alienation provisions of ERISA and is thus excluded from the bankruptcy estate pursuant to § 541(c)(2). Second, a debtor's ERISA welfare plan is not excluded and, although these funds come into the bankruptcy estate, they may be exempted under § 522(d)(10)(E). Clearly, the plain meaning of § 541(c)(2) does not render § 522(d)(10)(E) superfluous.

This Court's opinion in *Mackey* clearly recognizes Congress' intent to protect ERISA pension plans from garnishment by judgment creditors outside of bankruptcy. It is illogical to suggest, given Congress' intent to protect the pension plan pre-bankruptcy, that once an individual has sought the protection of bankruptcy, those creditors could reach the pension plan. *See John Hancock Mut. Life Ins. Co. v. Watson (In re Kincaid)*, 917 F.2d 1162, 1166 (9th Cir. 1990) (noting an incongruity in the notion that ERISA plan benefits which are protected from creditors before bankruptcy, lose that protection upon bankruptcy). *But see Reed v. Drummond (In re Reed)*, No. 90-15875, 1991 U.S. App. Lexis 28739 (9th Cir. Dec. 11, 1991) (reaffirming the *Daniel* holding).

The intent of Congress to protect ERISA pension plans from creditors was again discussed in *Guidry v. National Sheet Metal Workers Pension Fund*, 493 U.S. 365 (1990). The *Guidry* Court considered the propriety of a constructive trust imposed on the petitioner's pension benefits after the petitioner pleaded guilty to embezzling funds from his union. *See Guidry*, 493 U.S. at 372. Finding no meaningful distinction between garnishment as discussed in *Mackey* and the constructive trust remedy sought to be imposed in *Guidry*, this Court held that the constructive trust violated ERISA's prohibition on assignment or alienation of pension benefits.

The Court found this construction of the anti-alienation/assignment provisions "consonant with other statutory provisions designed to safeguard retirement income", *Guidry*, 493 U.S. at 372. The Court reasoned that:

> § 206(d) [29 U.S.C. 1056(d)(1)] reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps usually are, blameless), even if that decision prevents others from securing relief from the wrongs done them.

Id. at 376.

Thus, this Court has recognized the policy of Congress to protect pension benefits even where the party seeking relief has been wronged. Creditors involved in a bankruptcy proceeding have not been wronged in the manner that the *Guidry* Court addressed. *Guidry* involved a situation wherein an individual was permitted to retain his pension benefits with the company from which he had embezzled funds. Clearly, if pension benefits are protected in this situation, they should be safeguarded when a debtor seeks the protection of bankruptcy.

Accordingly, the Sixth Circuit's holding excluding the ERISA-qualified pension plan from the bankruptcy estate of the debtor pursuant to § 541(c)(2) is consistent with both the congressional policy of safeguarding pension plan assets and with this Court's interpretation and application of 29 U.S.C. § 1056(d)(1).

The amount of funds in the pension fund at issue herein is minimal. Both the debtor and the bankruptcy trustee have expended substantial time and effort disputing a clear and unambiguous statute. The debtor's financial resources are severely

limited. A summary disposition of this matter on the merits would best serve the interests of judicial economy and an insolvent debtor.

The Sixth Circuit's holding that § 541(c)(2) should be interpreted to exclude an ERISA-qualified pension plan from the bankruptcy estate is consistent with the clear meaning of the statute, the congressional policy of safeguarding pension fund assets and this Court's interpretation of the anti-alienation provisions of ERISA. The Third, Fourth and Tenth Circuits have agreed. This construction does not render § 522(d)(10)(E) superfluous as that section deals with welfare plan funds which are not subject to the anti-alienation/anti-assignment provisions of § 1056(d)(1).

CONCLUSION

For the foregoing reasons, respondent opposes this petition for a writ of certiorari and requests that this Court enter an order pursuant to Sup. Ct. R. 16.1, adopting the reasoning of the courts in *Lucas, Gladwell, Kardanis* and *Moore* and affirming the judgment of the Sixth Circuit below.

Respectfully submitted,

GEORGE FREEMAN LEGG
Counsel of Record
BECKY HURD HALSEY
STONE & HINDS, P.C.
Attorneys for Respondent
700 First American Center
507 Gay Street, S.W.
Knoxville, Tennessee 37902
(615) 546-6321

APPENDIX A — RELEVANT STATUTES

11 U.S.C. § 522(d)(10)(E):

§ 522. Exemptions

* * *

(d) The following property may be exempted under subsection (b)(1) of this section:

(10) The debtor's right to receive —

(E) a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, . . .

11 U.S.C. § 541(c)(1)(2):

§ 541. Property of the estate

* * *

(c)(1) Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate. . . .

(2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable

nonbankruptcy law is enforceable in a case under this title.

29 U.S.C. § 1056(d)(1)(1988):

§ 1056. Form and payment of benefits

* * *

(d) Assignment or alienation of plan benefits

(1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.